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SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

APPENDIX

Petition of Southland Incorporated for writ of certiorari to the Supreme Court of Georgia

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INDEX

Page

Appeal Extension of Time----------37, 38
Certificate of Urgency of Trial Court----------40
Complaint----------2
Cox Enterprises Appeal Decision----------5
Decision Affirming Trial Court----------5
Decision Dismissing Southland's Appeal in 25917--5
Decision Dismissing Southland's Main Appeal------5
Decision Dismissing Southland's Original Appeal--5
Decision in Appeal of Cox Enterprises----------5
Decision in Original Appeal----------5
Decision in Southland's Appeal----------5
Decision Reversing Trial Court----------5
Denial of Rehearing in 25917----------21
Denial of Rehearing in 26026----------31
Denial of Rehearing in Main Appeal----------21
Denial of Rehearing in Original Appeal----------21
Extensions of Time to Prepare Appeal---------37, 38
Georgia Supreme Court Decision 25917----------5
Georgia Supreme Court Decision 26026----------5
Georgia Supreme Court Decision in Main Appeal----5
Georgia Supreme Court Decision in Original Appeals
Georgia Supreme Court Decision in Secondary
Appeal----------5
Georgia Supreme Court Denies Rehearing in
Main Appeal----------21
Main Appeal Decision----------5
Main Appeal Rehearing Sought----------9
Motion of Petitioner to Dismiss Defendants'
Motion to Dismiss Appeal in Trial Court--------39
Motion of Southland for Rehearing in 25917--------9
Motion of Southland for Rehearing in Main Appeal-9
Motion of Southland for Rehearing in Original
Appeal----------9
Motion of Southland for Rehearing in 26026------22
Motion of Southland for Rehearing in Secondary
Appeal----------22
Motion to Dismiss Appeal in Trial Court Order---39
Order Denying Injunction as to Atlanta
Newspapers, Inc.----------35
Order Denying Injunction as to Batson-Cook Co.---35
Order Denying Injunction as to City of Atlanta---35

Order Denying Injunction as to Cox Enterprises---34
Order for Supplemental Transcript----------42
Order of Trial Court Denying Dismissal of Defendants' Motion to Dismiss Appeal----------40
Order of Trial Court Dismissing Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal----------40
Order setting up Hearing on Defendants' Motion to Dismiss Appeal in Trial Court--------39
Order setting up Original Hearing----------5
Original Appeal Decision----------5
Original Appeal Rehearing Sought----------9
Original Complaint----------2
Petitioner's Comment on Decisions----------9
Petitioner's Motion for Rehearing in 25917--------9
Petitioner's Motion for Rehearing in Main Appeal----------9
Petitioner's Motion for Rehearing in Original Appeal----------9
Petitioner's Motion for Rehearing in Secondary Appeal----------22
Petitioner's Motion for Rehearing in 26026-------22
Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal in Trial Court--------39
Rehearing in 26026 Denied----------32
Southland Denied Rehearing in 26026----------32
Petitioner Denied Rehearing in Secondary Appeal----------32
Rehearing Denied in 25917----------21
Rehearing Denied in Main Appeal----------21
Rehearing Denied in Original Appeal----------21
Rehearing Sought by Petitioner in 25917----------9
Rehearing Sought by Petitioner in Main Appeal----9
Rehearing Sought by Petitioner in Original Appeal----------9
Rehearing Sought by Petitioner in 26026---------22
Rehearing Sought by Petitioner in Secondary Appeal----------22
Remittitur Motion----------32
Remittitur Motion Main Appeal and Secondary Appeal----------32
Remitturs Stay----------33
Reversal of Trial Court----------5

Secondary Appeal Decision----------5
Secondary Appeal Rehearing Denied----------32
Secondary Appeal Rehearing Sought----------22
Show Cause Order for Permanent Injunction----------5
Southland Denied Rehearing in Secondary Appeal--32
Southland's Motion for Rehearing in 25917----------9
Southland's Motion for Rehearing in 25926----------22
Southland's Motion for Rehearing in Main Appeal--9
Southland's Motion for Rehearing in Original Appeal----------9
Southland's Motion for Rehearing in Secondary Appeal----------22
Stay of Remittur----------33
Supplemental Transcript Order----------42
Supreme Court of Georgia Decision 25917----------5
Supreme Court of Georgia Decision 25926----------5
Supreme Court of Georgia Decision in Main Appeal----------5
Supreme Court of Georgia Decision in Original Appeal----------5
Supreme Court of Georgia Decision in Secondary Appeal----------5
Supreme Court of Georgia Denies Rehearing in 25917----------21
Supreme Court of Georgia Denies Rehearing in Original Appeal----------21
Trial Court's Certificate of Urgency----------41
Trial Court's First Order----------5
Trial Court Motion to Dismiss Appeal Order----------39
Trial Court's Order Denying Dismissal of Motion to Dismiss Appeal----------40
Trial Court's Order Denying Injunction as to Atlanta Newspapers Inc.----------35
Trial Court's Order Denying Injunction as to Batson-Cook Co.----------36
Trial Court's Order Denying Injunction as to City of Atlanta----------36
Trial Court's Order Denying Injunction as to Cox Enterprises----------34
Trial Court's Order Dismissing Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal----------40

CASES CITED

Page

Albany Fed Sygs & Loan Assn v Henderson
31 SE 2d 20; 198 Ga 116----------18
Allison v Cobb County 98 Ga App 231; 103
SE 2d 196----------17
Brandon Manget & Co v Blake & Madden 68 SE
837; 135 Ga 71----------13
Bullard v Southern Ry Co 34 SE 1002; 110 Ga
304----------12
Central of Ga Ry Co v Hartley 103 SE 262; 25
Ga App 120----------14
Cherry v Brown 192 P 227----------27
CJS Vol 65 Sec 90----------26
Dixon v Minnesota Lumber Co 64 SE 71; 132 Ga
347----------13
Dowling v Tracy 116 Ga App 43; 156 SE 2d 524----17
Fahrig v Garrett 224 Ga 817; 165 SE2d 126--------24
Ferber v Leise 151 NW 307; 97 Neb 795----------27
Ga Terminal Co v Temple Bapt Ch 87 SE 1023;
144 Ga 791----------12
Georgia's Bill of Rights Code 2-105----------29
Gibbon v Lewis 137 Ga 22; 72 SE 412----------12
Gray v Gray 34 Ga 488----------11
Griffin v Hardware Mut Ins Co 91 SE 2d 10;
212 Ga 130----------13
Hall v Mayor and Council of Calhoun 79 SE
533; 140 Ga 611----------13
Harris v First Nat Bk 282 P 1097; 140 Okla 280--27
Hunnicutt v Groves 72 SE 526; 10 Ga App 12-------14
Indianapolis Life Ins Co v Lundquist 52 NE
2d 338; 222 Ind 350----------26
Keaton v Forbes 70 SE 1110; 135 Ga 188----------13

McIntyre v City of Vidalia 185 SE 318;----------13
Moody and Wife v Davis 10 Ga 410----------15
Morton v Beavers 80 SE 716; 141 Ga 210----------12
Mulling v State 80 SE 575; 140 Ga 36----------12
Peppers v Travelers' Ins Co 173 SE 177; 48
Ga App 886----------14
Preston v Walker 36 SE 723; 112 Ga 421----------12
Revere v Chandler 77 SE 818; 139 Ga 800----------12
Reynolds v Nimmons 96 Vt 222; 118 A 810----------29
Robinson v Burns 42 Ga 614----------14
Rogers v McDonald 226 Ga 329----------8-24
Seaboard Air Line Ry Co v Brooks 107 SE
878; 151 Ga 625----------13
Southern Express Co v J Palmer & Co 48 Ga 85----13
Southern Ry Co v Hubbs 121 Ga 428; 49 SE 294----17
Stanley v Stanley 35 SE 2d 366; 196 Ga 192----------14
State ex rel Benton v Elder 31 Neb 185; 47
NW 710; 10 LRA 756----------29
Steele v Central of Ga Ry Co 123 Ga 237 51
SE 430----------17
Taylor v Bank of Tifton 78 SE 335; 140 Ga 45----12
J N Taylor Trust v Briggs 142 Pac 183 Okla 306--27
Terrell v State 114 SE 910; 29 Ga App 286----------14
Town of Grantville v Fidelity Deposit Co 77
SE 627; 139 Ga 496----------13
Tripp v Evans 69 SE 551; 141 Ga 120----------12
W & A RR Co v Maynard 81 SE 666; 141 Ga 590----13
Wallace v Matthewson 84 SE 488; 143 Ga 237----14
Wise v Ray 112 SE 905; 28 Ga App 661----------14
Wright v Lake 76 Ga 219----------13
Zoebel v Caldwell 72 Neb 47; 99 NW 843;
102 NW 80----------28

SUPREME COURT OF THE UNITED STATES

October term, 1970

NO. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

A P P E N D I X

Petition of Southland Incorporated for writ of certiorari to the Supreme Court of Georgia

IN THE SUPERIOR COURT OF THE

COUNTY OF FULTON

STATE OF GEORGIA

SOUTHLAND, INCORPORATED VS. COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY, AND CITY OF ATLANTA	CIVIL ACTION FILE NO. B-44470 COMPLAINT

1. The defendants herein are Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., Batson-Cook Company, and City of Atlanta.

2. Cox Enterprises is a corporation organized in the State of Delaware with a principal office and place of business at 10 Forsyth Street, N.W., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

3. Atlanta Newspapers, Inc. is a corporation organized under the laws of Georgia, with principal office and place of business at 10 Forsyth Street, N.W., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

4. Batson-Cook Company is a corporation organized under the laws of Georgia, with an office place of business at 15 Peachtree St., N.E., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

5. City of Atlanta is a municipal corporation with principal office in the City Hall at 168 Mitchell St. S.W., in the City of Atlanta and County of

Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

6. The defendants herein have conspired to take over and convert to their own private use one-half of Fairlie Street, N.W. for a distance of one block from Marietta Street to the Railroad tracks, and one-half of Wall Street, N.W., for a distance of two blocks from Fairlie Street to Bartow Street in the City of Atlanta and County of Fulton, Georgia, and pursuant to said conspiracy have poured concrete foundations for a permanent multiple-story building for the purpose of conducting a newspaper business under the names of Atlanta Journal and Atlanta Constitution in said obstructed streets.

7. The said obstruction by the defendants in said streets has forced all traffic thereon into a narrow single lane, causing a heavy congestion of traffic on said streets and adjoining streets and prevents much traffic from using said obstructed streets.

8. The plaintiff occupies the building on the lower level of Forsyth Street and known as 11½ Forsyth Street, N.W., according to the present numbering of streets in the City of Atlanta, and its means of ingress and egress is over said streets illegally obstructed by the defendants.

9. Plaintiff conducts a warehouse, car-storage and printing business on lower level of said Forsyth Street at No. 11½ and has been severely, specially, and irreparably damaged by the defendants' obstructing its ingress and egress on said streets in its said business.

10. Plaintiff shows that the said obstruction of said streets constitutes a public and private nuisance.

11. Plaintiff shows that it will be severely, specially, and irreparably damaged in its business in the manner and particulars briefly stated herein as long as said obstruction of said streets continues.

12. Plaintiff shows that it has no adequate

remedy at law.

WHEREFORE, PLAINTIFF prays as follows:

(a) That defendents be temporarily restrained and enjoined from continuing the said obstruction of said streets and that upon a hearing the defendants be permanently enjoined and restrained from continuing the same.

(b) That process issue and be served upon the defendants together with a Rule Nisi requiring them to show cause at a time and place fixed by the court why they should not be permanently restrained and enjoined from continuing said obstruction of said streets.

F. L. Breen,
Attorney for Plaintiff,
325 Atlanta Natl. Bank Bldg.,
Atlanta, Ga. 30303

GEORGIA, FULTON COUNTY:

Personally appeared Boyd E. Taylor before the undersigned attesting officer, who, after being duly sworn, deposes and says that he is the president of Southland Incorporated; that he is authorized to make this affidavit; and that the foregoing complaint is true and correct.

Boyd E. Taylor

sworn to and subscribed before me
On this the 18th day of March, 1969

(G. Seals Aiken)

G. Seals Aiken
NOTARY PUBLIC, FULTON COUNTY, GEORGIA

ORDER

The foregoing complaint has been read and considered and directed to be filed together with this order. The defendants are hereby directed to show cause before this court on the 28 day of March, 1969, at 11 AM o'clock why they should not be permanently restrained and enjoined as prayed. It is further directed that the foregoing complaint and process together with this order be served upon the defendants.

This 18 day of March, 1969.

Sam Phillips McKenzie
Presiding JUDGE, FULTON SUPERIOR COURT.

263 324

Decided: OCT. 8, 1970

In the Supreme Court of Georgia

25917 SOUTHLAND, INCORPORATED, V. COX ENTERPRISES, INC., Et Al.

GRICE, Justice. This case is controlled by Cox Enterprises, Inc., Et Al. v. Southland, Incorporated, 226 Ga. , (SE2d) (Case No. 26026) this day decided.

Appeal dismissed.
All the Justices concur.

264 319

Decided: OCT. 8, 1970

In the Supreme Court of Georgia

26026 COX ENTERPRISES, INC., Et Al. v. SOUTHLAND, INCORPORATED

The trial court should have dismissed the appeal in Southland, Incorporated, v. Cox Enterprises, Inc., Et Al., 226 Ga. , (SE2d) (Case No. 25917) because of the unreasonable delay in filing of the transcript of evidence and proceedings.

GRICE, Justice. For decision here is whether an appeal should have been dismissed upon the ground of unreasonable and inexcusable delay in the filing of the transcript of evidence and proceedings.

This issue arose after the grant of summary judgments for the defendants in an action filed in

the Superior Court of Fulton County by Southland, Inc., against Cox Enterprises, Inc., the City of Atlanta, and Batson-Cook Co., seeking injunctive relief against continuance of an alleged obstruction of two streets by construction of a multi-story building. Atlanta Newspapers, Inc., was later named as a defendant.

Upon grant of the summary judgments, the plaintiff on May 1, 1969, filed a notice of appeal.

On May 8, 1970, before the appeal had been docketed in this court, two of the defendants filed in the trial court their motion to dismiss the appeal. The motion was based upon section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Code Ann. (6-809(b)) and asserted that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. The motion alleged that 13 months had elapsed between the judgments of the trial court and the filing of the transcript on May 7, 1970, and that during that time the defendants had expended large sums of money in constructing the building.

The trial court on May 20, 1970, after the appeal had been docketed in this court on May 12, 1970, (Case No. 25917), entered an order on the motion to dismiss, in which it found that "the delay in filing the transcript in this case was unreasonable and inexcusable and that this delay was caused by the . . . (plaintiff's) failure to decide to order the transcript as a whole until the fall of 1969."

This order further recited: "This court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the order of extensions previously granted as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this court denies the motion to dismiss the appeal.

"However, it is ordered that a transcript be made of this proceeding and this supplemental

transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed."

This appeal is from that judgment, which was certified for immediate review.

1. The evidence adduced before the trial court on the motions to dismiss the appeal, while in conflict, amply supported such finding of delay caused by the plaintiff.

The court reporter testified that it was not until August or September, 1969, that the plaintiff, or anyone on its behalf, ordered any kind of transcript; that in August or September of 1969, the plaintiff's president requested that the reporter type the objections to the evidence, and they were delivered to him in early October; that it was not until November 10, 1969, that the plaintiff's president ordered a transcript of all of the evidence and proceedings; and on December 11, 1969, such transcript was delivered to plaintiff's attorney; and that in late April or early May 1970, the plaintiff's president requested the reporter to obtain the original documentary evidence, and it was delivered to him that same day.

The project manager of the defendant contractor testified that between the date of the original hearing in the case and the hearing on the motion to dismiss, 75% of the construction had been completed, leaving only the finish items.

The vice-president of the defendant Atlanta Newspapers, Inc., testified as to the large financial outlay for the building during each of the 12 months that had ensued since filing of the notice of appeal.

2. The trial court having found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff and such finding being supported by the evidence upon the hearing, it should have dismissed the appeal.

Since that court did not enter a dismissal, this court will do so.

As we appraise the salient factors, the lapse

of time from the notice of appeal on May 1, 1969, to the filing of the transcript on May 7, 1970, under the circumstances referred to above, constitutes a stale appeal.

Although a 1968 amendment (Ga. L. 1968, pp. 1072; Code Ann. (6-809(b)) to the Appellate Practice Act provides that the trial courts, rather than the appellate courts, may dismiss appeals for failure of a party to file the transcript within the proper time, this court has held that such amendment does not change the responsibility of this court under the Constitution (Art. VI, Sec. II, Par. V; Code Ann. (2-3705), and that this court will dismiss a stale appeal. See in this connection, Fahrig v. Garrett, 224 Ga. 817 (165 SE2d 126).

(a) Furthermore, under the circumstances shown here dismissal cannot be avoided because of the successive extensions which the plaintiff obtained from judges of the trial court.

There is nothing in our statutes or decisions which requires that the obtaining of extensions per se excuses an appellant from the consequences of his own unreasonable delay.

This court in Rogers v. McDonald, 226 Ga. 329 (SE2d) recognized that the obtaining of extensions is not conclusive on the issue of delay by the appellant in filing the transcript. In that case several successive extensions had been granted and the appellee sought to have the trial court set aside the extensions as an abuse of judicial discretion under the facts appearing there. The trial court conducted a hearing at which full evidence was presented on the issue as to unreasonable delay and found that under the facts there was no cause to set aside the extensions. This court affirmed, stating that it was not shown that the appellant was in any way responsible for the length of time being taken by the reporter to prepare the transcript.

(b) The fact that the defendants did not object to the grant of the extensions does not bar

them from moving to dismiss the appeal.

Each of the extensions presented to the trial judge for his approval recited that an additional number of days "will be required in which to prepare the record on appeal . . ."

There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his own delay in ordering the transcript. Under the Appellate Practice Act (ga. L. 1965, pp. 18, 21, as amended; Code Ann. (6-804) the grant of such extensions may be ex parte.

For the foregoing reasons the judgment in the instant case is

Reversed.
All the Justices concur.

PETITIONER'S NOTE: Examination of the two companion decisions in this case shows that the Georgia Supreme Court dismissed the main appeal with four lines and devoted 161 lines to the secondary appeal, then decided that the secondary appeal, filed three months after the main appeal, "controlled."

IN THE SUPREME COURT OF GEORGIA

SOUTHLAND, INCORPORATED,)
APPELLANT)
VS.) CASE NO. 25917
COX ENTERPRISES, INC.,)
DOING BUSINESS AS ATLANTA)
NEWSPAPERS, INC., ET AL,)
APPELLEES)

MOTION OF SOUTHLAND, INCORPORATED TO THE SUPREME COURT OF GEORGIA FOR A REHEARING.

Now comes Southland, Incorporated, Appellant in the above stated case, during the term in which judgment was rendered for Defendants Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., et al, and within the time provided by law, and makes this its motion for a rehearing. It will be referred to in this motion

as Plaintiff and Cox Enterprises, Inc. et al as Defendants, the respective positions they occupied in the trial court.

The judgment of this Court complained of was rendered October 8, 1970.

This Court has very obviously overlooked some material facts in the record, some statutes, and some decisions which are controlling as authority and which would require a different judgment from that rendered, and has erroneously construed and misapplied provisions of law and controlling authorities. The said material facts in the record and controlling statutes, decisions, authorities, and provisions of law are specified briefly below.

At the close of the trial in the lower court on April 4, 1969, the Court Reporter misplaced all of the documentary evidence (258 pages of exhibits, including affidavits, charts, photographs, plats, etc.) and did not find it until April 24, 1970, nearly 13 months later, thus delaying the preparation and filing of the transcript of the evidence necessary to be transmitted with Plaintiff's appeal to the Supreme Court. This is the uncontroverted evidence in the record. Despite this uncontradicted evidence, the lower court, and this court in deciding Case No. 26026, stated that the delay was inexcusable and was caused by the Plaintiff. At no time was the Plaintiff in custody or control of the missing evidence, and at no time was care of the evidence the responsibility of the Plaintiff.

The dismissal of Plaintiff's appeal by this Court deprives it of its property without due process of law and without equal protection of the law in violation of Article I, Section I, Paragraphs II, III, and IV of the Georgia Constitution and Section I of Amendment XIV of the U. S. Constitution as applied to the States, by depriving it of its right under the said provisions of the Georgia and U.S. Constitutions to a review of the erroneous judgment of the trial

court granted to other persons in like circumstances and similar situations.

THE UNCONTRADICTED EVIDENCE IS THAT THE PLAINTIFF WAS DILIGENT AT ALL TIMES IN ITS EFFORTS TO HAVE THE TRANSCRIPT COMPLETED AND TRANSMITTED WITH THE APPEAL PROMPTLY TO THIS COURT.

The judgment of this court that, "This case is controlled by Cox Enterprises, Inc. Et al v. Southland, Incorporated, 226 Ga., (Case No. 26026) this day decided," and "Appeal dismissed," is without foundation in fact or law and unsupported by any authority whatever. The so-called controlling case was filed nearly three months after the appeal in this case was docketed. Thus the new case is said to control the older case, although the decisions were handed down the same day. Nowhere have we been able to find an instance in which a later case controls an older case. Nowhere have we been able to find another instance in which the alleged controlling case dealt with matter entirely different from that of the case allegedly controlled.

Case No. 26026 which this court states controls this case, No. 25917, deals with one subject and one subject only, namely, alleged staleness of appeal. The record in this case, No. 25917, presents voluminous evidence of fact, many questions of law, and questions which must be decided in the public interest and in justice to Plaintiff. None of these matters is even touched upon in the so-called controlling case no. 26026.

This Court in 1866 laid down the ground rules for controlling cases. In Gray vs. Gray, 34 Ga. 499, it held: "A decision of this Court WHEN IN POINT, is conclusive authority in SUBSEQUENT CASES." Since that time this Court has consistently held in hundreds of cases the facts or the questions propounded must be the same in the controlling case and the case controlled. The decision of this Court in case no. 25917 does not meet this test.

If the questions presented by the original appeal of Southland, Incorporated, are

not decided by this Court now, they will no doubt be back before this Court in future appeals. Much litigation can be avoided and justice can be served by facing the issues in this appeal and deciding them correctly now.

In 1911 this Court held that former decisions UNDER THE SAME FACTS were controlling. Giddens vs. Lewis, 137 Ga. 22, 72 S.E. 412. The Court of Appeals has consistently followed the same principle as in Central of Ga. Ry. Co. Vs. Hartley, 25 Ga. App. 120, 103 S.E. 262, in which it held that the case controlled NEARLY EVERY PARTICULAR in a suit by another plaintiff growing out of the same transaction.

Back to decisions of this Court we find in 1916 Mulling v. State, 88 S.E. 575, 145 Ga. 36, that the question propounded was SUBSTANTIALLY THE SAME as in the controlling case.

In Morton v. Beavers, 80 S.E. 716, 141 Ga. 219, we find that "this case is IDENTICAL IN ITS FACTS" with the controlling case.

In Georgia Terminal Company v. Temple Baptist Church, 87 S.E. 1023, 144 Ga. 791, we find that the facts relied on are SUBSTANTIALLY THE SAME as in the controlling case.

In Revere v. Chandler, 77 S.E. 818, 139 Ga. 600, we find "this case ON ITS FACTS is controlled by * * *"

In Taylor v. Bank of Tifton, 78 S.E. 335, 140 Ga. 45, this Court said "the FACTS AND THE ASSIGNMENTS OF ERROR ARE THE SAME" as in the controlling case.

In Tripp v. Evans, 80 S.E. 551, 141 Ga. 120, this Court said: "UNDER THE FACTS of this case it is controlled by * * *"

In Bullard v. Southern Railway Co., 34 S.E. 1002, 110 Ga. 304, this Court said: "The FACTS IN THIS CASE clearly bring it within the principle announced in * * *". (The controlling case).

In Preston v. Walker, 36 S.E. 723, 112 Ga. 421, this Court held: "This case, UPON ITS FACTS, falls squarely within the ruling" of the controlling case.

In Town of Grantville v. Fidelity Deposit Company, 77 S.E. 627, 139 Ga. 495, this Court held: "UNDER THE FACTS OF THIS CASE it is controlled by * * *."

In Southern Express Co. v. S. and J. Palmer and Co., 48 Ga. 85, this Court held: "THE FACTS AND PLEADINGS ARE SIMILAR TO THE PRESENT CASE and must control it."

Cases decided by this Court which are offered as being THE SAME IN POINT are Griffin v. Hardware Mutual Insurance Co., 91 S.E. 2nd 10, 212 Ga. 130; Western and Atlantic Railroad Co. v. Maynard, 81 S.E. 866, 141 Ga. 590; and Seaboard Air Line Railway Co. v. Brooks, 107 S.E. 878, 151 Ga. 625.

The original appeal of Southland, Incorporated and the "controlling" case of Cox Enterprises, Inc. are NOT THE SAME IN POINT.

Other decisions in this Court in which the controlling case was required to be the SAME IN POINT are Browden, Manget & Co. v. Blake & Madden, 68 S.E. 837, 135 Ga. 71; Keaton v. Forkas, 70 S.E. 1110, 136 Ga. 188; Hall v. Mayor and Council of Calhoun, 79 S.E. 533, 140 Ga. 611; McIntyre v. City of Vidalia, 185 S.E. 318; Albany Federal Savings and Loan Assn. v. Henderson, 31 S.E. 2nd 20, 198 Ga. 116.

As far back as 1885 this Court found that a case could not control if there was a difference in the facts or issues. In Wright v. Lake, 75 Ga. 219, this Court held: "The points directly involved in those cases do not control this * * are not binding as a decision where the facts are different."

None of the facts in the appeal of Southland Incorporated is covered in the appeal of Cox Enterprises, the "controlling case."

This Court in its present decision failed to recognize this case.

In Dixon v. Minnesota Lumber Co., 64 S.E. 71, 132 Ga. 347, this court held "A case is not controlling where the subject matter is different."

The "controlling" case here deals solely with staleness of an appeal, which is not the subject matter of the case which it controls.

In Terrell v. State, 114 S.E. 910, 29 Ga. App. 286, the case was controlled by a ruling in a companion case in which the facts were the same.

In Wise v. Ray, 112 S.E. 905, 28 Ga. App. 661, the Appeals Court held: "This is a companion case * * The two cases were tried together; the EVIDENCE IN THIS CASE IS THE SAME as in the other case * * and the ruling in that case is controlling in this."

In Central of Georgia Railway Co. V. Hartley, 103 S.E. 262, 25 Ga. App. 120, the Appeals Court held the case was controlled in NEARLY EVERY PARTICULAR by rulings made in another case growing out of the same transaction.

The Southland Incorporated appeal and the Cox Enterprises, Inc. appeal are NOT COMPANION CASES.

In Hunnicutt v. Graves, 72 S.E. 526, 10 Ga. App. 12, the Appeals Court held: "The law applicable to the issues made by the evidence in this case was fully stated in the opinion of this court when the case was here before."

In the present case none of the ISSUES MADE BY THE EVIDENCE is dealt with in the "controlling case."

In Stanley v. Dominy, 26 S.E. 2nd 355, 196 Ga. 192, this Court held that the rule of stare decisis would hold in a subsequent case for injunction in the same matter.

In Robinson v. Dumas, 42 Ga. 614, the judgments were on the SAME POINTS made in the controlling decision.

In Wallace v. Matthewson, 84 S.E. 450, 143 Ga. 237, this court held the injury was THE SAME as in the controlling case.

In Peppers v. Travelers' Insurance Co., 173 S.E. 177, 48 Ga. App. 595, the Appeals Court held: "Where MATERIAL FACTS OF CASE WERE IDENTICAL with those in the case previously decided, the previous decision was controlling."

How can the Cox Enterprises decision be found to control the original Southland appeal when the Cox decision deals with entirely different subject matter and does not consider any of the facts in the Southland case? How can the new case serve to dismiss the appeal in the earlier case?

Plaintiff contends it is a violation of a well established principle of law and justice as well as a violation of both the Georgia and U. S. Constitutions to apply a law or decision retroactively. Article I, Section III, Paragraph II of the Georgia Constitution expressly provides: "No Bill of Attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grant of special privileges or immunities, shall be passed." (Ga. Code Sec. 2-302). Article I, Section IX, paragraph 3 of the U. S. Constitution provides that "No bill of attainder or ex post facto law shall be passed," and Article I, Section 10 of the U. S. Constitution provides in part: "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." These provisions of the U. S. Constitution are applicable to the States under Section I of Amendment XIV thereof.

Whether this Court sees fit to reverse or affirm the judgment of the trial court in this case, Plaintiff is entitled to a decision on the points raised in its appeal. In the case of Moody and Wife vs. Davis, 10 Ga. 410-411, this court held in part: "The beautiful theory of a trial is this: Both sides are represented by counsel, that their rights may be settled, not by art or chicane or the tricks of the orator, but ACCORDING TO THE LAW. It is therefore the duty of counsel to present to the Court the points which he conceives are in favor of his client; and it is his right to be heard in argument to sustain them; and WHEN PRESENTED, IT IS THE DUTY OF THE COURT TO PASS UPON THEM, IF THEY GROW OUT OF THE CASE * * * If he declines to pass upon a principle thus moved,

and it springs out of the case, such declining is error * * * As officers of the Court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. They are THE FRIENDS OF THE COURT, enlisted with him in the sublime work of discovering truth, and dealing out justice between man and man. It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to law. Whilst judgment belongs alone to the Judge - enlightenment is the province of the lawyer, and I apprehend that no Judge can be found so presumptuously vain, or so flagrantly unjust, as not to recognize, and that too with grateful emotions, the aid which he derives, in the discharge of duties more solemn than belong to any other functionary, from an able bar. * * * It is the duty of the Judge to enforce the laws of the State, made in accordance with the State and Federal Constitutions - THE WHOLE LAW, as it applies, in his judgment, to the cases which come before him. He has no right and no power to withhold the application of one single principle of law to a single case over which he has jurisdiction; he has no dispensation justifying or excusing an omission to APPLY THE LAW. * * *"

As to the date the transcript was ordered, the president of the plaintiff corporation testified in an affidavit in the record of this Case, 25917, and again in a separate pleading in Case 26026 as follows:

"On April 8, 1969, four days after the trial, I paid the plaintiff's half of the takedown costs and ORDERED THE TRANSCRIPT prepared for appeal."

This is plain, positive and direct. It is the type of testimony which is given preference in decisions of this Court and by Ga. Code Sec. 38-111.

Direct and positive testimony (such as that of the plaintiff president) has been given

preference to negative, self-contradictory, vague, evasive and equivocal testimony (such as that of the defendants) by this Court in Southern Railway Co. v. Hobbs, 121 Ga. 428, 49 S.E. 294; and Steele v. Central of Ga. Ry. Co., 123 Ga. 237, 51 S.E. 438.

The same principles have been upheld by the Court of Appeals in Allison v. Cobb County, 98 Ga.App. 231, 103 S.E.2nd 195; and Dowling v. Tracy, 116 Ga. App. 43, 156 S.E.2nd 524.

The court reporter had opportunity in an affidavit and in oral testimony, both recorded in the transcript of the Motion to Dismiss the Appeal (which will be referred to subsequently as T-MDA) to refute and deny directly the aforesaid evidence, but he did not do so. He had opportunity to deny that he had reported the evidence missing for many months. He did not do so.

This Court in 26026 described the evidence on the date the transcript was ordered as "conflicting" but obviously overlooked the affidavit of the president of the plaintiff corporation.

The evidence given by the reporter was not merely conflicting, it was self-contradictory, negative, vague, evasive and equivocal. Yet this testimony was accepted by the trial court and by this court as the basis for saying the delay in the appeal was caused by the plaintiff.

In his affidavit (T-MDA 6 Par 3) the reporter says:

"TO THE BEST OF MY RECOLLECTION, the first time that the plaintiff in this action or anyone on behalf of the plaintiff, ordered any type of transcript with respect to said hearing was during August or September, 1969".

Next paragraph:

"TO THE BEST OF MY RECOLLECTION, the next time, etc."

(T-MDA 7 Par 3) "TO THE BEST OF MY KNOWLEDGE, the next time, etc."

When questioned on the stand by counsel for the defendants as to who ordered the transcript, and when, the reporter replied: (T-MDA 38 Par 2)

"A. The best I remember it was Mr. Taylor,

and again, the best I remember because I don't have any notes about any specific date, but July, August, or September of last year, 1969."

This was the vague and equivocal evidence which the court below, and this court, accepted in preference to the direct and positive statement of the exact date as given by the president of the plaintiff corporation.

On this evidence both courts have concluded that the plaintiff delayed its decision to order the transcript until August, 1969 and that this caused the delay in the appeal.

In answer to defense counsel's simple question, "At that time what did Mr. Taylor ask you to do?" the record at T-MDA 38 last Par., gives this classic example of evasion, vagueness and equivocation:

"A. Well, I had previously talked to Mr. Breen, I just saw him up here one day. He said that - well as a matter of fact I saw him the day that he filed the notice for appeal and he said that they were going to, AS I REMEMBER, proceed without the record, try to proceed without the record. (Mr. Breen filed an affidavit in 26026 as a separate pleading categorically denying this statement). That, I THINK, was in May, I THINK, is when the order was signed by (sic) the appeal, the appeal notice was signed. Then Mr. Taylor, around in July, August, I don't think it was September, but July or August, I THINK, said that they would like to have the objections to the affidavits, I BELIEVE, that were presented during the trial and I got those out for him some time right after that."

Here he says "July" but in his previous affidavit he had testified the transcript was ordered in "August."

Plaintiff's evidence showed that he had paid the reporter $500 in advance for the transcript and $87.50 balance on its completion. (T-MDA 79 Par. 3). This was to speed up preparation of the appeal when the plaintiff feared the reporter was delaying the work because of lack of money.

This suspicion was confirmed by the

reporter when he testified (T-MDA 41 Par. 5):

"A. It would have been just prior to that but as far as I was concerned I wasn't going to start on it until I had the $200 because it was going to cost me at least that out of my pocket for a typist."

When examining counsel tried to get something definite on a date from the reporter the answer was: (T-MDA 42 bottom)

"A. Probably some time in March. That is JUST A WILD GUESS."

It was on the testimony of a reporter who made WILD GUESSES as to dates that the Plaintiff has been denied a review of its cause in this court when the crucial evidence was a matter of a date.

When defense counsel tried to pin down the reporter as to dates of talks with the president of the plaintiff corporation, the reporter testified: (T-MDA 43 Par. 4)

"A. I THINK I MAY have had a conversation with Mr. Taylor somewhere in this time."

At this point the Court asked: "Somewhere when?"

In his answer the reporter here obviously tried to shirk responsibility for the missing exhibits as shown below:

"THE WITNESS: Somewhere in this - between December and late April. Now it may have been March, and it had something to do with the exhibits. I THINK he called me and asked me where the exhibits were and I - at that time I THINK I asked him, 'Well, doesn't Mr. Aiken have them?' He said 'No' and I said 'Well, then maybe the judge has them,' because I remember that during this time you (the Judge) and Mr. Henderson (the Court's law clerk) had them for a while and then I had them for a while."

The president of the plaintiff corporation had testified (T-MDA79 last par.) that when he had asked the reporter why he was so long preparing the transcript the reporter told him the exhibits were missing. The reporter never denied this.

The missing exhibits finally were found,

after nearly 13 months, in a cabinet in an ante room of the court when a special search was made by the reporter, another reporter, and the court's law clerk.

The search and finding of the exhibits are described by the reporter in testimony at T-MDA 44 Par. 1.

Thus it is clear that the appeal was delayed by missing exhibits due to the negligence of the trial court's reporter. After the typed portion of the transcript was completed the filing was delayed five months more because the EVIDENCE WAS STILL MISSING and the appeal could not be filed without it.

After the evidence was found the appeal was transmitted within a few days and within the time allowed by the last timely extension.

Throughout the nearly 13 months the evidence was missing, the plaintiff's president diligently inquired frequently of the reporter, of court officials and the clerk, and finally of the court's law clerk, who insisted that the missing evidence was not on the court's premises. (T-MDA 80 Par. 3) (T-MDA 81 Par. 2)

It was after this development that the reporter was challenged by the president of the plaintiff corporation to produce the missing documents as his responsibility. Then the reporter enlisted another reporter and the court's law clerk in a search that revealed that the missing evidence was in a cabinet in the anteroom of the trial judge. (T-MDA 44 Par. 1)

CONCLUSION

The said judgment of this Court deprives Plaintiff of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the Law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution ; and Amend-

ments V, IX, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other persons and corporations in like circumstances and similar situations, in the foregoing particulars.

This Honorable Court is therefore urged to pass upon the grave and substantial legal and constitutional questions raised in plaintiff's appeal in this case, No. 25917.

Respectfully submitted,
/s/ G. Seals Aiken
G. SEALS AIKEN
Attorney for Southland Incorporated

SUPREME COURT OF GEORGIA 25917

Atlanta, October 22, 1971

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Southland, Incorporated. v. Cox Enterprises, Inc., et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta, Feb. 1, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk.

IN THE SUPREME COURT OF GEORGIA

COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ET AL, APPELLANTS	CASE NO. 26026
VS.	
SOUTHLAND INCORPORATED, APPELLEE	

MOTION OF SOUTHLAND INCORPORATED TO THE SUPREME COURT OF GEORGIA FOR A REHEARING.

Now comes Southland Incorporated, Appellee in the above stated case, during the term in which judgment was rendered for Appellants Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., et al, and within the time provided by law, and makes this its motion for a rehearing. It will be referred to in this motion as plaintiff and Cox Enterprises, Inc. et al as Defendants, the respective positions they occupied in the trial court.

The judgment of this Court complained of was rendered October 8, 1971.

This Court has very obviously overlooked some material facts in the record, some statutes, and some decisions which are controlling as authority and which would require a different judgment from that rendered, and has erroneously construed and misapplied provisions of law and controlling authorities. The said material facts in the record and controlling statutes, decisions, authorities, and provisions of law are specified briefly below.

At the close of the trial in the lower court on April 4, 1969, the Court Reporter misplaced all of the documentary evidence (258 pages of exhibits, including affidavits, charts, photographs, plats, etc.) and did not find it until April 24, 1970, nearly 13 months later, thus delaying the preparation and filing of the transcript of the evidence necessary to be transmitted with Plaintiff's appeal to the Supreme Court. This is the uncontroverted evidence in the record. Despite this uncontradicted evidence, the lower court, and this court in deciding this Case, No. 26026, stated that the

delay was inexcusable and was caused by the Plaintiff. At no time was the Plaintiff in custody or control of the missing evidence, and at no time was care of the evidence the responsibility of the Plaintiff.

The dismissal of Plaintiff's appeal by this Court deprives it of its property without due process of law and without equal protection of the law in violation of Article I, Section I, Paragraphs II, III, and IV of the Georgia Constitution and Section I of Amendment XIV of the U. S. Constitution as applied to the States, by depriving it of its right under the said provisions of the Georgia and U. S. Constitutions to a review of the erroneous judgment of the trial court granted to other persons in like circumstances and similar situations.

THE UNCONTRADICTED EVIDENCE IS THAT THE PLAINTIFF WAS DILIGENT AT ALL TIMES IN ITS EFFORTS TO HAVE THE TRANSCRIPT COMPLETED AND TRANSMITTED WITH THE APPEAL PROMPTLY TO THIS COURT.

When considering the reporter's conflicting statements about the dates the transcript was ordered, it must be borne in mind that the reporter was embarrassed by the fact he had lost the 258 pages of documentary evidence and was on the defensive.

In his affidavit and in his testimony on the stand the reporter was vague, indefinite, evasive and equivocal in his reporting of dates.

There was nothing vague, equivocal or indefinite in the evidence on the date of ordering the transcript as given in the affidavit of the president of the plaintiff corporation (the appellee), which was timely filed before argument in the case.

This evidence shows that the transcript was ordered on April 8, 1969, four days after the close of the trial in the lower court. The transcript could not be filed until after April 24, 1970 when the reporter, along with another reporter and the court's law clerk, made a search of the court's premises and found the missing evidence in an anteroom of the court.

The complete transcript with the 258 pages of evidence properly arranged, indexed and bound was

filed two weeks after the missing evidence was found.

Since the court in this decision has recited in detail the contentions of the Appellant Cox Enterprises and nowhere does it state the defenses of the Appellee, it must be assumed that the Court overlooked the pleadings of the Appellee, including the affidavit of its president.

When the court reporter loses the documentary evidence, delaying the appeal, how can it be said that Southland Incorporated causes the "unreasonable delay"?

This Court in its decision cited the case of Rogers v. McDonald, 226 Ga. 329. If this court considered the evidence and applied the same principles it would reach the same decision in this case, namely that "it was not shown that the appellant was in any way responsible for the length of time being taken by the reporter to prepare the transcript."

The Appellee in this action of course was the Appellant in the original appeal.

This Court's decision says:

"There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his (sic) own delay in ordering the transcript."

This statement is eminently correct. The plaintiff's claim that additional time was required WAS NOT DUE TO ITS OWN DELAY IN ORDERING THE TRANSCRIPT. The defendants could not have known it and no one else could have known it, because it was not true.

Additional time was required because the evidence was missing and time was required to search for the missing documents.

This court cites the case of Fahrig v. Garrett, 224 Ga. 817, (165 S.E.2nd 126). If the Court will read this case again it will see that Fahrig deals with an appeal in which no extension for filing had been granted. This situation distinguishes it from the present case.

This Court in its decision says:

"There is nothing in our statutes or decisions which requires that the obtaining of

extensions per se excuses an appellant from the consequences of his own unreasonable delay."

We agree. If we had caused an unreasonable delay, or any delay, we would not rely on the extensions.

The Court's statement above is based on the assumption that the plaintiff caused the delay, an assumption which is not supported by the evidence.

When a court reporter "loses" or misplaces all the documentary evidence in a case and thus delays an appeal thirteen months (T. 79-81) during which the defendants are able to bring to near completion a building (R.93) which the suit seeks to enjoin (R.2), it would be a miscarriage of justice to hold that the delay was caused by the appellant, (Appellee in this appeal) (R.84; T.33 last par.)

Southland Incorporated, plaintiff, performed all of its responsibilities in the case when it filed timely notice of appeal (R.60), ordered the transcript and evidence prepared by the reporter (T.79), paid him in advance (T.79; T.41 Par. 5), paid all costs promptly (T.23 line 2), diligently sought and obtained proper extensions of time (R.11-45-46-47-49), and filed and transmitted the record, transcript and evidence to this court within the time allowed by the last extension (R.56-64).

This Court pointed out in support of its decision that during the delay 75 per cent of the construction was completed. The court must know that the defendants constructed the building at their peril.

This Court pointed out in support of its decision that the defendants expended a large financial outlay in constructing the building. We contend that no expenditure, no matter how large, can justify in law or equity the erection of an obstruction in the public streets.

We agree that in this appeal there has been unreasonable and inexcusable delay. However, the statement that the delay was caused by the plaintiff is not shown by the evidence.

The evidence is that the delay was caused by missing exhibits, the responsibility of the

reporter. The defendants have argued, despite evidence to the contrary, that the plaintiff caused the delay by late ordering of the transcript.

The transparency of this argument, however, is shown by the fact that even after the reporter completed his typing with aid of a partial file of duplicate exhibits furnished by the plaintiff, the reporter still was unable to file the transcript because all the documentary evidence was still missing, and the filing was delayed another five months while plaintiff's search for the missing evidence continued.

Thus, even if it were true (but it was not) that the plaintiff was late in ordering the transcript, the appeal could not be transmitted without the exhibits which were missing 13 months.

Thus the date of ordering the transcript to which the trial court attached undue importance is irrelevant in determining the cause of the delay. The missing evidence was the sole cause of delay.

Dereliction of duty and irresponsibility in caring for evidence on the part of court reporters seldom appear in Georgia case law, but we have found the circumstances in the present case duplicated in cases cited in several other jurisdictions. The present case is the only case we have been able to find in any jurisdiction in which a litigant has been denied a review in an appellate court by reason of the negligence of a reporter.

In Indianapolis Life Insurance Co. v. Lundquist, 53 N.E.2d 338, 222 Ind. 359, it was held:

"9. Official court reporters are an arm of the court, with duty of preserving a record of the evidence, and a failure to make such record available is a failure of the court which entitles injured party to equitable relief.

"11. Where reporter's notes and exhibits were lost beyond recovery through no fault of appealing defendant, and it would be impossible to procure a bill of exceptions without them, defendant was entitled to a new trial unless parties could agree on bill of exceptions."

CJS Vol. 66, Sec. 98, says:

"New trials have been granted where a review of the case has been prevented by the loss of the files, or of instructions, or of the official stenographic notes of the proceedings, OR EXHIBITS."

CJS Vol. 66, Sec. 98, page 280 says:

"Where the unsuccessful party has been deprived, without his fault or negligence, of the official stenographer's transcript of the evidence, or of an official transcript of the record in time to obtain a review of the case, a new trial may be granted in some jurisdictions."

In J. H. Taylor Trust v. Driggs, 143 P.2d, 193 Okla. 346 (which cites Cherry v. Brown, 192 P.227) it was held:

"Where a reporter lost shorthand notes, making it impossible for her to transcribe the evidence, thereby precluding plaintiff from completing his appeal, and plaintiff and his counsel were free from negligence and had used reasonable diligence to complete case-made within time prescribed by law, plaintiff was entitled to new trial."

In Harris v. First National Bank, 282 P. 1097, 140 Okla. 269, it was held:

"RELIANCE ON COURT REPORTER NOT NEGLIGENCE. It is neither slight, ordinary nor gross negligence on the part of the complaining party or his counsel to rely on the court reporter furnishing him with a transcript of his stenographic notes of the evidence and proceedings, for the purpose of incorporating it in case-made for appeal or proceeding in error, within the time allowed by law to make and serve case-made."

In Ferber v. Leise, 151 N.W.307, 97 Nebr., 795, it was held:

Headnote: "A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time."

The decision says in part:

"It is claimed that it must be alleged and shown that there was error in the court below in favor of the party who seeks relief.

"It is enough that he has been denied his Constitutional right of review in the proceedings. It is not a case alone where he has been beaten in a meritorious controversy alleged and proven. It is just a case where he has been denied the right to review the proceedings of the court below.

"Sec. 2 Art. I of the Constitution of the state reads:

"'The right to be heard in all civil cases in the court of last resort by appeal, error or otherwise, shall not be denied.'

"It does not say all meritorious cases, but all civil cases. This means that none is to be excluded.

"If the power was forbidden to be exercised except in those cases where errors are alleged and proven, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all.

"In any event, the people, by the adoption of this provision of the Constitution, have said to the Supreme Court, you must not deny 'the right to be heard', and this right applies to all civil cases.

"It is apparent from the petition that the plaintiff was not at fault and that her failure to present the bill of exceptions within the time limited was due wholly to the inability of the official stenographic reporter to prepare the transcript of evidence."

In Zweibel v. Caldwell, 72 Nebr. 47, 99 N.W. 843, 102 N.W. 84, it was held:

"The Constitution, in guarantying to every litigant a review of his case in the Supreme Court (Con. Art. 24) would seem to indicate that equity would interfere, even to the extent of granting a new trial, to preserve such a right of review if it had been prevented without fault of the party himself. In the present case the trial court found - and we are not prepared to say that its findings are contrary to the weight of evidence - that the right of review had been lost without fault on the part of the complaining party

because of the failure of the clerk to make the transcript.

"There is no finding as to whether this was the clerk's fault or misfortune.

"In any event, it was his duty to find the files and make the transcript. It would seem that Zweibel and his counsel had the right to depend on him for it.

"The jurisdiction assumed here for the granting of a new trial cannot be claimed under any recognized head of equity jurisdiction. It must be found if at all under Sec. 318 of the Code and the provision of our Constitution in securing to the litigant in every case a review in the court of last resort.

"Section 13 of the Articles of the Constitution, providing that the court shall be open to every person for any injury done, and that he shall have a remedy, has been held to be broader than the common law, and to entitle the courts to grant a remedy whenever a wrong has been done. State ex rel Benton v. Elder, 31 Nebr. 185, 47 N. W.710, 10 L.R.A. 796. (Similar provision is made in Georgia's Bill of Rights, Code 2-104).

"The view of the district court that the defendant in the ejectment suit (the plaintiff here) had lost his right of review without fault on his part, and after making all required effort to obtain it, and was therefore entitled to a new trial, is sustainable from the evidence, and should be sustained here, if the underlying doctrine is granted that such loss of right of review entitles one to a new trial without the necessity of any showing of probable error sufficient to reverse the action of the court at the ejectment trial."

In Reynolds v. Romano, 96 Vt. 222, 118A. 810, we find:

Headnote 2. NEW TRIAL. Facts resulting in loss of benefit of exceptions held to warrant new trial.

The decision held in part:

"Where a case was heard in one term of court, but findings and judgment not entered until

the next, within which interval the court reporter terminated his employment and left the state, and when called on to furnish a transcript and record of the exceptions saved refused to do so, and these facts were certified to by the court, held that under Gen. Laws 2296 such facts constituted sufficient grounds for a new trial if they occurred without petitioner's fault and that he was not chargeable with lack of diligence or negligence merely because he did not attempt some idle ceremony which would obviously have been of no avail without the help of the reporter.

"(2) The facts certified in the bill of exceptions (and they are fully sustained by evidence in support of the petition) clearly make a case for a new trial under GL 2296.

"The right of a party to have his exceptions heard in this court is a substantial right, the loss of which entitles him to a new trial if it has occurred without his fault.

"It is urged that the failure to get a hearing on his exceptions was due to plaintiff's own negligence; but plainly this is not the case.

"Under the present practice in the county the record of the trial is kept by the stenographic reporter, an official of the court. Both court and counsel rely upon him for a record of the exceptions taken during the trial."

CONCLUSION

The said judgment of this Court deprives Plaintiff of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the Law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution; and Amendments V, IX, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other

persons and corporations in like circumstances and similar situations, in the foregoing particulars.

This Honorable Court is therefore urged to reverse its erroneous and unconstitutional decision in case No. 26026 and to pass upon the grave and substantial legal and constitutional questions raised in Plaintiff's appeal in case No. 25917.

Respectfully submitted,
/s/ G. Seals Aiken
G. SEALS AIKEN,
Attorney for Southland Incorporated, Appellee

SUPREME COURT OF GEORGIA 26026

Atlanta, October 22, 1971

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Cox Enterprises, Inc., et al. v. Southland, Incorporated.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta, Feb. 1, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF GEORGIA

SOUTHLAND INCORPORATED, APPELLANT VS. COX ENTERPRISES, INC. DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ET AL,	NO. 25917
APPELLANTS VS. SOUTHLAND INCORPORATED, APPELLEE	NO. 26026

MOTION OF SOUTHLAND INCORPORATED TO WITHHOLD REMITTITUR FOR NINETY DAYS FROM DATE OF DENIAL OF ITS MOTIONS FOR REHEARING IN ORDER TO ENABLE IT TO PREPARE AND FILE WITH THE U. S. SUPREME COURT A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Now comes Southland Incorporated and moves this Court for a stay of the remittitur for a period of ninety days from October 22, 1970, the date of denial by this Court of its motions for rehearing, in order to enable it to prepare and file with the U.S. Supreme Court a petition for a writ of certiorari to this court to review, revise, and reverse its said denial of said motions for rehearing.

This motion is based upon the ground that the said denial of said motions for rehearing deprives Southland Incorporated of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution under Section I of Amendment XIV of the U.S. Constitution; and in violation of Amendments V, IX and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other persons and corporations in like circumstances

and similar situations.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Southland, Incorporated

SUPREME COURT OF GEORGIA 25917, 26026
Atlanta, November 2, 1970

The Honorable Supreme Court Met Pursuant to Adjournment.
By Chief Justice Almand:
The following direction was given:
Southland, Incorporated v. Cox Enterprises, Inc., et al.
Cox Enterprises, Inc., et al v. Southland, Incorporated.

Upon consideration of the motion of Southland, Incorporated, for a stay of this court's remittiturs in order that it may file in the Supreme Court of the United States an application for certiorari to obtain a review of this court's judgments rendered in these cases on October 22, 1970, such motion is hereby granted subject to the following conditions:

The clerk of this court is directed to withhold the transmittal of such remittiturs to the trial court for ninety days from October 22, 1970, and until the final disposition of the said cases by that court; Provided that promptly upon the filing of such application in the Supreme Court of the United States, counsel for the applicant shall notify the clerk of this court thereof in writing and also shall promptly notify the clerk of this court of any judgment of that court denying such application, or, if no such application be filed in that court within the said ninety day period or within an authorized extension thereof, counsel for applicant shall in writing promptly so notify the clerk of this court.

This 2nd day of November, 1970.

/s/ Bond Almand
Chief Justice

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta,
Witness my signature and the seal of said court

hereto affixed the day and year last above written.
/s/ Joline B. Williams Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

SOUTHLAND, INC. Plaintiff vs. COX ENTERPRISES, INC. d/b/a/ ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY AND CITY OF ATLANTA Defendants	No. B-44470

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant Cox Enterprises, Inc., d/b/a/ Atlanta Newspapers, Inc. oral motion to dismiss which the Court treats as one for summary judgment.

Movant contends that whatever damage, if any, that Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner of leases of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained and said action is hereby dis-

missed as to said defendant.

It is so ordered this 4th day of April, 1969.

Judge Sam Phillips McKenzie

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant Atlanta Newspapers, Inc.'s oral motion to dismiss which the Court treats as a motion for summary judgment:

Movant contends that whatever damage, if any, plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion of Atlanta Newspapers, Inc., as thus considered by the Court is sustained and said action is hereby dismissed as to said defendant.

It is so ordered.

This 4th day of April, 1969.

SAM PHILLIPS McKENZIE, JUDGE
SUPERIOR COURT, A. J. C.

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant

Batson-Cook Company's oral motion to dismiss which the Court treats as one for summary judgment.

Movant contends that whatever damage, if any, that Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained and said action is hereby dismissed as to said defendant.

It is so ordered this 4th day of April, 1969.

/a/ Sam Phillips McKenzie
Judge

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant City of Atlanta's oral motion to dismiss which the Court treats as one for summary judgment:

Movant contends that whatever damage, if any, Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained, and said action is hereby dismissed.

It is so ordered this 4th day of April, 1969.

Judge Sam Phillips McKenzie

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA

SOUTHLAND, INCORPORATED, Plaintiff vs. COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY, AND CITY OF ATLANTA, Defendants	CIVIL ACTION NO. B-44470

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately ninety days will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including August 15, 1969.

This the 1 day of May, 1969.

/s/ Sam Phillips McKenzie
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately sixty more days from October 15, 1969 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including

December 14, 1969.

This the 6th day of October, 1969.

Signed: Sam Phillips Mc Kenzie
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately sixty more days from December 14, 1969 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including February 12, 1970.

This the 9th day of December, 1969.

/s/Claude Shaw
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It being made to appear to the Court that approximately ninety more days from February 12, 1970 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant;

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including May 12, 1970.

This the 2 day of February, 1970.

/s/Luther Alverson
JUDGE OF FULTON SUPERIOR COURT

ORDER

The foregoing motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., having been read and considered, the same is hereby allowed and ordered filed, and it is hereby

ORDERED that plaintiff, Southland, Incorporated, show cause before the Undersigned Judge of this Court on the 13 day of May , at 1 O'clock P.M., then and there to be heard, why said appeal should not be dismissed as prayed for in said motion.

FURTHER ORDERED that said motion, together with a copy of this order, be served upon the parties to this action as provided by law.

This May 8 , 1970.

/s/Sam Phillips McKenzie
Judge, Superior Court
Atlanta Judicial Circuit
MINUTES 524 PAGE 555

Filed in office May 8 1970
Ruby H. Ward
Deputy Clerk Superior Court
Fulton County Georgia

IN THE SUPERIOR COURT OF THE
COUNTY OF FULTON
STATE OF GEORGIA

SOUTHLAND INCORPORATED	)
VS.	) Civil Action
COX ENTERPRISES, INC., DOING	) File No. B-
BUSINESS AS ATLANTA NEWSPAPERS, INC.	) 44470
BATSON-COOK COMPANY; and	) Book 2488
CITY OF ATLANTA	) Page 545

MOTION OF SOUTHLAND INCORPORATED TO DISMISS THE MOTION OF COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. TO DISMISS PLAINTIFF'S APPEAL TO THE SUPREME COURT OF GEORGIA.

Now comes Southland Incorporated and moves this Court to dismiss the motion of Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal of Southland Incorporated to the Supreme Court of Georgia upon the ground that the transcript of the

evidence and proceedings has been certified by the court reporter and filed with the clerk of this court and the clerk of this court has prepared the record for transmittal to the Supreme Court and a certificate to accompany the same and the plaintiff has paid the required costs on appeal, and said case has been docketed under No. 25917 in the Supreme Court of Ga. and that this court has therefore lost jurisdiction of this case for any purpose.

ORDER

The above Motion coming on for a hearing and after considering same said Motion is hereby dismissed. The basis for the ruling is reflected in the record as this reported.

This 13th day of May, 1970.

Judge S.P. McKenzie

Filed in office May 21 1970
R. L. Lawson
Deputy Clerk Superior Court
Fulton County Georgia

Minutes 524 Page 551

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOUTHLAND, INC.	)	
VS.	)	CIVIL ACTION
COX ENTERPRISES, INC.	)	NO. B-44470
ATLANTA NEWSPAPERS, INC.	)	

ORDER

The above and foregoing cause came on before this Court for hearing on a motion to dismiss, under the provisions of Code Section 6-809(b), the appeal of the appellant, Southland, Inc., from an order of this Court. After hearing depositions and oral testimony, and considering same, the Court finds as follows:

This Court is of the opinion that the delay in filing the transcript in this case was unreasonable and inexcusable, and that this delay was caused by the appellant's failure to decide to order the transcript as a whole until the Fall of 1969.

This Court, however, recognizes the danger inherent in any statute which permits a trial court

to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the orders of extension previously entered, as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this Court denies the motion to dismiss the appeal.

However, it is ordered that a transcript be made of this proceeding and this supplemental transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed.

This 20 day of May, 1970.

/s/ Sam Phillips McKenzie
JUDGE, SUPERIOR COURT, A.J.C.

IN THE SUPERIOR COURT OF THE COUNTY OF FULTON, STATE OF GEORGIA

7

SOUTHLAND, INCORPORATED VS. COX ENTERPRISES, INC., doing business as ATLANTA NEWSPAPERS, INC.; ATLANTA NEWSPAPERS, INC.; BATSON-COOK COMPANY; and CITY OF ATLANTA	CIVIL ACTION NO. B-44470 CERTIFICATE THAT IMMEDIATE REVIEW OF ORDER SHOULD BE HAD

The undersigned Trial Judge, who rendered the order in this action dated May 20, 1970, denying the motion of the defendants Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal taken by the plaintiff, hereby certifies within ten (10) days of the entry thereof that such order is of such importance to the case that immediate review should be had.

This 26 day of May, 1970.

/s/ Sam Phillips McKenzie
SAM PHILLIPS McKENZIE
Judge, Superior Court
Atlanta Judicial Circuit

MINUTES 524 PAGE 591

Filed in office May 26 1970
Walter W. Miles

Deputy Clerk Superior Court
Fulton County Georgia 16

IN THE SUPERIOR COURT OF THE
COUNTY OF FULTON, STATE OF GEORGIA

SOUTHLAND, INCORPORATED	
V.	
COX ENTERPRISES, INC. doing business as ATLANTA NEWSPAPERS, INC.; ATLANTA NEWSPAPERS, INC.; BATSON-COOK COMPANY; and CITY OF ATLANTA	CIVIL ACTION NO. B-44470

ORDER

It appearing that the record in the above action has been transmitted to the Supreme Court of Georgia pursuant to the Notice of Appeal filed herein by the plaintiff, Southland, Incorporated, and the Court having heretofore entered an order, dated May 20, 1970, which, among other things, directs the Clerk of this Court to transmit a supplemental transcript to the Supreme Court of Georgia, and it further appearing that the following additional matters, which are material to Cox Enterprises, Inc. and Atlanta Newspapers, Inc., two of the Appellees in said appeal, have been omitted from such record on appeal:

1. Exhibit A to the affidavit of Mr. William I Ray, Jr., which affidavit is set forth at pages T. 500 through T. 512 of the transcript heretofore transmitted to the Supreme Court of Georgia, and which exhibit, it appears, should have been inserted at page T. 507 of such transcript.

2. The order of Court entered herein on May 20, 1970, on the motion of the defendants Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal of plaintiff, Southland, Incorporated.

3. The motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal taken by Southland, Incorporated, plaintiff, which motion was filed for record on

May 8, 1970.

4. The answer of Southland, Incorporated, plaintiff, to said motion of defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., which answer was filed for record on May 12, 1970.

5. The motion of Southland, Incorporated, plaintiff, to dismiss said motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., which motion was filed in open court on May 13, 1970, and filed for record on May 21, 1970.

Accordingly, pursuant to Ga. Code Ann. (6-805(f), and at the suggestion of said Appellees, the Court orders and directs the Clerk of this Court to prepare and certify a supplemental record which contains the foregoing matters and to transmit such supplemental record, together with the transcript of the proceedings in this action held before this Court on May 13, 1970, to the Supreme Court of Georgia.

This June 23rd, 1970.

/s/ Sam Phillips McKenzie
JUDGE, SUPERIOR COURT,
ATLANTA JUDICIAL CIRCUIT